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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HOUMAN MOGHADDAM, Plaintiff and Appellant, v. KEVIN BONE et al., Defendants and Respondents.	G038221 (Super. Ct. No. 811370) O P I N I O N

Appeal from a judgment and orders of the Superior Court of Orange County, Sheila Fell and John M. Watson, Judges. Affirmed with directions.

Law Offices of Yevgeniya G. Lisitsa and Yevgeniya G. Lisitsa for Plaintiff and Appellant.

M. Candice Bryner for Defendants and Respondents.

This case has languished on the courts' dockets for nearly a decade. The case started in July 1999 when Houman Moghaddam filed a lawsuit against Kevin and Morgan Bone (the Bones) following a dispute involving a car Moghaddam subleased from the Bones. Simply stated, Moghaddam sued the Bones for damaging his credit rating after they reported he had missed several car lease payments. At the end of 1999, the trial court entered a default judgment in favor of Moghaddam when the Bones failed to answer the complaint. Moghaddam waited three years before attempting to enforce the judgment.

In 2004, the default was set aside based on the Bones' unopposed claim of extrinsic fraud/mistake. In 2005, the trial court agreed to reconsider its ruling, and again set aside the default. In *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283 (*Moghaddam I*), this court reversed the order based on our determination the 2004 order was invalid due to lack of proper notice, and the 2005 order should be reversed because the court incorrectly placed the burden of proof on Moghaddam, rather than on the Bones when reconsidering the motion.

Moghaddam has returned to this court, appealing from the court orders entered while *Moghaddam I* was still pending, and the ruling made after the case was returned to the trial court. Specifically, Moghaddam appeals from: (1) the order deeming him a vexatious litigant; (2) the order requiring him to post a $30,000 bond; (3) the order deeming requests for admissions admitted; (4) the court's denial of his motion to reconsider the above orders; (5) the order denying his request for attorney fees incurred on appeal in *Moghaddam I*; (6) the order setting aside the default judgment; and (7) the judgment of dismissal based on Moghaddam's failure to post the security. We find none of his contentions on appeal have merit. We affirm the judgment and orders. Moreover, we order Moghaddam is henceforth subject to the prefiling requirement for vexatious

litigants pursuant to Code of Civil Procedure section 391.7.[1] The Bones' June 2008 request for judicial notice is granted. All other motions pending on appeal are denied.

FACTS & PROCEDURAL HISTORY

While the appeal in *Moghaddam I* was pending the Bones served a notice of deposition on Moghaddam and requests for admissions. When Moghaddam failed to respond, the Bones moved to deem the requests admitted, which the court granted on June 14, 2005.

The Bones moved to have Moghaddam declared a vexatious litigant. Moghaddam, who was previously acting in propria persona, substituted Gina Lisitsa as his counsel of record. Nevertheless, on June 13, 2005, Judge John M. Watson heard and granted the Bones' motion. On July 5, 2005, the court entered an order deeming Moghaddam a vexatious litigant and requiring him to post an undertaking of $30,000 within 30 days.

A few weeks later, our opinion was filed in which we reversed the order setting aside the default and the case was remanded for the trial court "to consider anew the motion to set aside the default and default judgment." (*Moghaddam I, supra*, 142 Cal.App.4th at p. 292.) In the opinion, we instructed the trial court to weigh all the evidence and the credibility of the parties to determine whether the Bones had satisfied their burden of proof on the motion. (*Ibid.*)

On August 30, 2006, Moghaddam filed a motion for reconsideration of the orders (1) deeming him a vexatious litigant, and (2) admitting as true the requests for admissions. On October 20, 2006, the Bones filed a motion to dismiss the action due to Moghaddam's failure to post a $30,000 undertaking. The following month, Moghaddam filed a motion for attorney fees, seeking those fees incurred on appeal as a cost item.

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

The Bones also filed a motion to set aside the default judgment based on new evidence of fraud, as well as the evidence previously submitted. Moghaddam filed an ex parte application to strike the new evidence, which was denied by Judge Geoffrey T. Glass. Three weeks later, Moghaddam filed a similar ex parte application, which was denied by Judge Sheila Fell.

On December 12, 2006, Judge Fell made several rulings, noting the "credibility of the parties is a major issue[.]" The court granted the Bones' motion to dismiss based on Moghaddam's failure to post an undertaking. It also granted their motion to set aside the default judgment. The court denied Moghaddam's motion for attorney fees. The Bones filed a notice of ruling. Moghaddam filed a notice of appeal, listing numerous orders filed over the past year.

While the case was being briefed, the parties filed numerous motions and requests.

(1) On April 18, 2008, the Bones filed a request for judicial notice regarding new evidence Moghaddam's criminal history included a forgery conviction. Moghaddam filed an opposition. The Bones filed an objection and a motion to strike the opposition. We informed the parties the request for judicial notice and motion to strike would be decided in conjunction with the decision on appeal.

(2) Moghaddam's counsel filed a letter brief in May 2008, requesting that this court "delay any rulings in this case and issue an order that [Kevin and Morgan Bone] serve all documents both via facsimile and mail prior to filing them with [this] court." After considering the Bones' response, Moghaddam's reply, and the Bones' "sur-reply," we denied the request in a court order dated July 8, 2008.

(3) On June 17, 2008, Moghaddam filed a motion for judicial notice of the briefs, reporter's transcript, appendices, and the published opinion filed in the previous case. Moghaddam recognized much of this information was already contained in our record on appeal and asked this court not "to take judicial notice of the facts . . . but

rather the SIZE of the [prior] case." On July 8, 2008, we denied this June 17, 2008, motion for judicial notice.

(4) On June 19, 2008, the Bones filed a motion for sanctions and a motion for judicial notice of documents purportedly supporting sanctions. We received Moghaddam's opposition. We informed the parties these motions would be decided in conjunction with the decision on appeal.

(5) On June 26, 2008, Moghaddam filed a motion to strike the appendix and addendum of documents submitted by the Bones with their June 19, 2008, request for judicial notice. The Bones filed an opposition to this motion. We informed the parties this matter would be decided in conjunction with the decision on appeal.

(6) On June 26, 2008, Moghaddam filed a motion to strike the motion for sanctions. We denied this motion on July 8, 2008.

(7) On June 26, 2008, Moghaddam moved for sanctions against the Bones and their attorney for filing an improper appendix and addendum in support of their motion for judicial notice. We informed the parties the motion would be decided in conjunction with the decision on appeal.

(8) On June 26, 2008, the Bones filed a motion requesting this court to impose a vexatious litigant prefiling order to control future litigation. On July 1, 2008, this court received and filed Moghaddam's opposition to the motion. We informed the parties this motion would be decided in conjunction with the decision on appeal.

(9) On June 26, 2008, the Bones filed a motion for judicial notice in support of the motion for a vexatious litigant prefiling order, accompanied by two volumes of documents titled "appendix of exhibits in support of [Bones'] motion for a vexatious litigant pre-filing order[.]" On July 2, 2008, this court received and filed Moghaddam's opposition to the motion. We informed the parties the motion for judicial notice would be decided in conjunction with the decision on appeal.

(10) On June 27, 2008, Moghaddam filed a motion for summary reversal of the finding vacating the default and default judgment. Because this motion sought the same remedy as appellant's opening and reply briefs, we denied the motion in a court order dated July 8, 2008.

In July 2008, this court asked the parties to file supplemental briefs addressing the following two questions:

"(1) On January 31, 2007, Houman Moghaddam filed a notice of appeal challenging the court order (dated June 13, 2005) declaring him a vexatious litigant. It appears the appeal from this order is untimely. On November 17, 2006, the trial court reconsidered the issue and again issued an order declaring Moghaddam a vexatious litigant. It is questionable whether the appeal of this order, on the motion to reconsider, is separately appealable or timely. The parties are invited to address whether this court has jurisdiction to review these two orders; and

"(2) It appears Moghaddam has attempted to appeal from a nonappealable minute order dismissing his action for failure to post an undertaking. (. . . § 581d; see *Munoz v. Florentine Gardens* (1991) 235 Cal.App.3d 1730, 1731 [unsigned minute order is not appealable].) The court is considering dismissing this issue from the appeal and invites briefing." The parties submitted informal letter briefs.

On October 14, 2008, Moghaddam moved for judicial notice of several documents, including the final judgment he recently obtained from the superior court. A few days later, Moghaddam moved for sanctions against the Bones for opposing his request for a judgment in the superior court and for maliciously moving for a prefiling order. We denied the motion for sanctions and granted the motion for judicial notice with respect to only the final written judgment.

LEGAL DISCUSSION

I. Appealability

As mentioned above, we granted the motion requesting judicial notice of the signed judgment of dismissal Moghaddam obtained after filing his appeal. Moghaddam's notice of appeal stated he appealed from the orders: (1) granting the motion to set aside the default and default judgment; (2) denying the motion for reconsideration of the vexatious litigant determination and deemed admissions; (3) denying the motion for reconsideration of attorney fees; and (4) granting the motion to dismiss. These orders are all nonappealable. "Generally, Courts of Appeal strictly adhere to the one final judgment rule. [Citation.] But we have discretion to entertain a premature appeal as long as a judgment was actually entered, there is no doubt concerning which ruling appellant seeks to have reviewed, and respondents were not misled to their prejudice. [Citation.] Given the confused state of the underlying record in this matter, we do not believe any purpose would be served by penalizing appellant for taking a premature appeal. Nor do we see any evidence that respondents were prejudiced or misled. Accordingly, our discretion is exercised in favor of hearing the matter on the merits." (*Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 69; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 2:262, pp. 2-130 to 2-131.)

II. The Motion to Set Aside the Default and Default Judgment

In the disposition section of our prior opinion, *Moghaddam I*, *supra*, 142 Cal.App.4th at page 292, we stated the postjudgment orders were reversed and the case was remanded "for the court to consider anew the motion to set aside the default and the default judgment." Moghaddam believes the trial court should have taken a very literal interpretation of this mandate and considered only the Bones' original motion to set aside the default, rather than their revised motion that contained additional

information the Bones discovered while the appeal was pending. He contends the appeal "may very well turn on the word '***the.***'"

"The interpretation of an appellate opinion is governed by the rules of construction that apply to any other writing. Interpretation should be reasonable and should reflect the circumstances under which the opinion was rendered. It is elementary that the language used in an opinion is to be understood in the light of the facts and the issues then before the court. [¶] The entire opinion must be read as a whole to ascertain the precise conclusion arrived at and announced. Each statement must be considered in its proper context, and isolated statements may not be lifted from an opinion and regarded as abstract and correct statements of law." (16 Cal.Jur.3d (2002) Courts, Construction of Opinions, § 322, pp. 856-857, fns. omitted.)

The trial court correctly interpreted the disposition in the proper context of the entire opinion, taking into account facts and issues before the appellate court. Moghaddam's appeal was based on his belief he did not get a fair "do over" when the court reconsidered the Bones' motion to set aside the default. We agreed the hearing was unfair because the trial court misplaced the burden on Moghaddam, requiring him to convince the court the prior order setting aside the default judgment should be overturned. (*Moghaddam I*, *supra*, 142 Cal.App.4th at p. 291.) The Bones, as the moving party of the motion, had the burden of proving each element to set aside the default. (*Ibid.*) Adhering to the strong public policy of allowing an individual his day in court, we determined Moghaddam deserved a proper "do over." (*Ibid.*) In so concluding, we recognized the trial court had expressed dismay at having to piece together the facts, assess the credibility of the parties, and decipher the complicated legal proceedings that had ensued. We reminded the trial court, "However, as difficult as the determination may be, the trial court is obligated to correctly weigh each party's assertions and come to a conclusion regarding the motion before it." (*Id.* at p. 292.)

In light of our discussion in the prior opinion, we find it is disingenuous for Moghaddam to now suggest the trial court (and the Bones) were limited to considering the exact same motion and evidence on remand. How is that a fair "do over" for the Bones? Just as Moghaddam is entitled to have the court apply the correct burden of proof, the Bones are entitled to bring forth whatever relevant evidence they have uncovered to meet their burden of proof in trying to set aside the default entered against them.

III. The Order Setting Aside the Default Judgment

A motion to vacate entry of default and set aside a default judgment is addressed to the sound discretion of the trial court. In the absence of a clear showing of abuse, the exercise of that discretion will not be disturbed on appeal. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 (*Shamblin*).) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Id.* at pp. 478-479.)

It is well settled: "It is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. [Citation.] Therefore, when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default. [Citation.]" (*Shamblin, supra,* 44 Cal.3d at p. 478.)

Moghaddam asserts there was convincing evidence the Bones were served with the complaint at their residence, but they are lying about it. He points to evidence from a landlord stating the Bones did not move until August 7, 1999, and from a registered process server stating he served the papers on July 28, 1999. In making this argument, Moghaddam in effect asks this court to reweigh the evidence presented to the trial court. This we cannot do. (*Shamblin, supra,* 44 Cal.3d at p. 479.)

We discern no abuse of the trial court's discretion in finding the Bones were not living at the residence at the time of service, and that they demonstrated

reasonable diligence in seeking to set aside the default once it was discovered. The court could have reasonably relied on Kevin Bone's declaration stating, "Neither my wife nor I were ever served with any summons and complaint in this action. While I cannot recall the exact date that we moved from the Ovation address to Irvine, I never received the summons and complaint in the mail at either of these locations. According to the declaration of our then landlord, Carl J. Lind, we were 'occupying' the Ovation address until August 9, 1999. Again I do not know the exact move-out date. However, even though my wife and I had moved to Irvine, we were still storing some of our belongings at the Ovation address for a certain period, for which we were required to pay rent. . . . Regardless, I never received any summons and complaint, in the mail or otherwise." Similarly, Morgan Bone declared the above facts were true and she "was never personally served with any summons and complaint in this action." These statements alone adequately serve to support the trial court's decision.

But there was more. While Moghaddam's prior appeal was pending, the Bones discovered additional evidence to support their motion to set aside the default judgment. They submitted a declaration from Tom Daly, the Orange County Clerk Recorder. Daly stated he examined the prior declaration he "purportedly executed" in 2005 in support of Moghaddam's opposition to the motion to set aside the default. In the 2005 declaration, Daly attested Moghaddam recorded an abstract of judgment in 2003 and sent a copy of the judgment to the Bones at "6411 Adrianne Court, Port Orange, FL 32128." Daly declared, "While the signature on the [2005] declaration appears to be my signature, I have no recollection of personally signing the declaration. Further, it would be non-routine for me to sign [such] a declaration." He added, it was the common practice of his office to keep copies of correspondence he has signed, but his "staff was unable to locate a copy of the 'alleged' declaration in our records." Finally, Daly stated the signature page of the 2005 declaration has a fax number and the name Private Solutions. Daly declared he has no knowledge of Private Solutions and the number listed

is not his office or personal fax number. The Bones argue the 2005 declaration is a forgery.

The Bones also discovered Moghaddam, and his prior girlfriend, Sara Pederson, were both convicted felons. The Bones requested the court take judicial notice of court documents showing Moghaddam's criminal history, including: (1) a 2002 conviction for mail fraud and wire fraud; (2) a 2000 conviction for willful corporal injury on Pederson and assault and battery on someone else; and (3) a 1996 guilty plea and conviction for structuring a financial transaction to evade federal currency reporting requirements (31 U.S.C. § 5324). The Bones found court documents showing Pederson obtained a domestic violence protective order against Moghaddam in 2000 as a condition of his probation, and she filed for a temporary restraining order (TRO) when he was released from federal prison in 2004. The records showed Pederson had a 2003 conviction related to theft and drug possession charges.

The Bones said they also discovered facts regarding the purported service of the summons and complaint that created a strong suspicion of fraud. The Bones asserted they were storing furniture in the apartment, but not living at the 9 Ovation address when they were allegedly served with the complaint. They explained process server, "John Robert Wilkes, made six unsuccessful attempts to serve the Bones between July 14 . . . and July 25, 1999." All of the attempts were made between the hours of 7:00 a.m. and 9:00 a.m. when Morgan Bone would normally have been home with her two young children. Wilkes attested he personally served Morgan Bone at 7:51 a.m. on July 28, 1999. Kevin Bone was not home and was, therefore, subserved though service on his wife. Oddly, Moghaddam's girlfriend, Pederson attested in her proof of service that she personally served Kevin Bone that same morning with a statement of damages at 8:00 a.m. The Bones wonder why Moghaddam sent Pederson to serve a document when he was paying a process server to deliver documents at the same time. They reasonably question, "With . . . Pederson admittedly at the Bones' doorstep at or around the same

time . . . Wilkes showed up, one can only wonder upon whom . . . Wilkes served the summons and complaint."

In addition, two days after the Bones were purportedly served with the summons and complaint, Pederson executed a proof of service showing she mailed to the Bones a document entitled "reservation of right to seek punitive damages on default judgment[.]" As aptly noted by the Bones, "Of course, this begs the question: Why was Moghaddam expecting to obtain a default judgment against the Bones just two days after they were purportedly served with the lawsuit? The answer is simple: Moghaddam was well aware that the Bones were never served." Given the record, we discern no abuse of the trial court's discretion in finding the Bones were not served with the lawsuit.

IV. Issue of the Process Server's Fraud

Moghaddam asserts the Bones' failure to prove the process server committed fraud precludes the court from exercising its equitable powers and granting them relief. Not so. "'Where, as in the present case, a motion to vacate a default judgment is made more than six months after the default was entered, the motion is not directed to the court's statutory power to grant relief for mistake or excusable neglect under . . . section 473, but rather is directed to the court's inherent equity power to grant relief from a default or default judgment procured by extrinsic fraud or mistake.' [Citations.]" (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 314 (*Gibble*).)

"'Extrinsic fraud occurs when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented from fully participating in the proceeding. [Citation.] Examples of extrinsic fraud are: . . . failure to give notice of the action to the other party, and convincing the other party not to obtain counsel because the matter will not proceed (and then it does proceed). [Citation.] The essence of extrinsic fraud is one party's preventing the other from having his day in court.' [Citations.] Extrinsic fraud

only arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense. [Citations.]" (*Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1300.)

For extrinsic fraud, there is no specific requirement the process server must have committed fraud. All that is required is evidence one party has fraudulently been prevented from having its day in court. As noted above, the Bones presented sufficient evidence they were not given notice of the lawsuit and Moghaddam fraudulently obtained a default judgment. Their declarations provided evidence they did not receive the summons or complaint. It could reasonably be inferred Moghaddam knew the service by mail did not reach them because they had moved. And for the reasons stated above, there was evidence suggesting the proof of service relating to personal service was false because either the process server's signature was forged, or he was misguided into serving Moghaddam's friend, Pederson. The court properly exercised its inherent equitable power to set aside the default.

V. Sufficiency of Evidence—Issues of Diligence and Lack of Prejudice

When the defendant's default has resulted in a judgment for the plaintiff, there are three essential requirements to obtain relief from the default. Moghaddam challenges the court's finding on the last requirement, that the Bones showed reasonable "diligence in seeking to set aside the default once it was discovered." (*Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147-1148 (*Stiles*).)

The formula of three requirements was created to foster the following policies: "'[W]hen relief under section 473 is available, there is a strong public policy in favor of granting relief and allowing the requesting party his or her day in court. Beyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional circumstances should relief be granted.' [Citations.]" (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981-982.) "The questions of defendant's diligence and plaintiff's prejudice are 'inextricably intertwined.' The greater the prejudice to the

plaintiff from vacating the default the greater the burden on the defendant of proving diligence and vice versa. As a general rule once a default has resulted in a judgment there is a high degree of prejudice to the plaintiff in vacating the default because it entails setting aside the judgment and disturbing the plaintiff's justifiable reliance on the award. Every case, however, must be judged on its peculiar circumstances." (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 833-834, fns. omitted (*Falahati*).)

Indeed, the case of *Falahati, supra*, 127 Cal.App.4th 823, provides authority for the proposition that a party who has obtained a default judgment by means of an unfair maneuver cannot justifiably rely on such a judgment and therefore suffers little prejudice when it is set aside. The court in *Falahati* granted relief even though the defendant did not seek help until 10 months after the default judgment was entered. (*Id.* at pp. 833-834.) The Bones presented evidence the default judgment was obtained by Moghaddam's fraudulent conduct. For this reason, it cannot be said he could justifiably rely on it.

Moreover, Moghaddam's own lack of diligence in obtaining the default judgment and serving the judgment belied any claim he might make of eagerness to obtain an early judgment. After the hearing, Moghaddam waited eight months to obtain the written and signed default judgment, and then waited three years to send a copy of the judgment to the Bones in Florida. The Bones' nine-month delay in challenging the default judgment appears insignificant in comparison. And, the Bones offered several reasonable excuses for their delay in challenging the default judgment, such as they did not understand what it was, Moghaddam refused to respond to their telephone calls, they had difficulty obtaining court records, and they were suffering from financial difficulties at the time. As noted above, the decision ultimately was one for the trial court's discretion. (*Rappleyea, supra,* 8 Cal.4th at p. 981; *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854, 857.) Given the record of Moghaddam's fraud and delays postjudgment, we find no abuse of discretion here.

VI. Challenge to the Court's Vexatious Litigant Finding

"A court exercises its discretion in determining whether a person is a vexatious litigant. [Citation.] We uphold the court's ruling if it is supported by substantial evidence. [Citations.] On appeal, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment. [Citation.]" (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219.)

Vexatious litigant statutes were created "to curb misuse of the court system by those acting in propria persona who repeatedly relitigate the same issues." (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1008 (*Bittaker*).) Section 391, subdivision (b)(1), defines "vexatious litigant" as a person who "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing." "Litigation" is statutorily defined as "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).)

Judge Watson listed over five "litigations" commenced by Moghaddam as his basis for deeming him a vexatious litigant. In the minute order, the court listed: (1) Moghaddam v. Reid; (2) "dismissal of appeal of Reid case as a separate proceeding;" (3) "Moda v. Seyrafi [Orange County Superior Court] OCSC Nos. 812801 and 99FL003578;" (4) Moda v. Sepetjian; (5) Moghaddam v. Bureau of Prisons; (6) "Moghaddam v. Bureau of Prisons-Appeal of interim order denying right to amend;" (7) Moda v. Showcase Properties; (8) "Moghaddam v. Bone – as to dismissal of World Omin Vt. Inc. and Experian." Moghaddam asserts only one should count against him. We disagree, and we will address each "litigation" finding in turn.

(1) Moghaddam v. Reid (Case No. 02-01219—Dismissed by the Federal District Court

In 2002, Moghaddam sued Thomas D. Reid, Regional Director of the U.S. Department of State Passport Agency in the U.S. District Court, Central District of California. He asserts the court's dismissal of this case should not count against him because he ultimately obtained the relief he was seeking, i.e., issuance of a passport application. However, there was no factual support in the record to sustain this claim other than Moghaddam's declaration. The trial court "was free to discount [his] self-serving statement." (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 780 (*Tokerud*).)

(2) Appeal of Moghaddam v. Reid—Voluntarily Dismissed by Moghaddam

Moghaddam maintains he dismissed the appeal in this action when the passport was tendered. As with the underlying litigation, he asserts his dismissal of this appeal should not count against him because he accomplished the object of the litigation. Moreover, he asserts the appeal should not be considered a separate strike from the underlying action. Not so. An appeal qualifies as a strike under the definition set forth in section 391. (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1216 ["Manifestly, 'any civil action or proceeding' includes any appeal or writ proceeding"].) Moreover, it counts as a strike separate from the underlying litigation because the appeal is "new" to the appellate court, and therefore qualifies as litigation described in section 391, subdivision (a). (*Id.* at pp. 1220-1221, fn. omitted.)

(3) Moda v. Seyrafi OCSC Nos. 812801 & 99FL003578—Both Dismissed

In August 1999, Moghaddam filed a lawsuit (OCSC No. 812801) against Sherwin Seyrafi, which alleged intentional infliction of emotional distress, assault, battery, false arrest, and false imprisonment. Less than one year later, in July 2000, Moghaddam filed a request for dismissal. Moghaddam argues the case resulted in a favorable termination because, as stated in his declaration, "dismissal was a result of settlement between the parties." He also notes the case should not count as a strike

against him because he was represented by counsel when the dismissal was filed. Not so.

The Bones presented evidence Moghaddam commenced the action in propria persona. Although Moghaddam may have been represented by counsel when the litigation ended, the case still qualifies for consideration under section 391, subdivision (b)(1). This definitional provision applies if he commenced, prosecuted, or maintained litigation in propria persona, which he clearly did. (See *Stolz v. Bank of America* (1993) 15 Cal.App.4th 217, 225 (*Stolz*).)

If dismissal was a result of settlement between the parties, the dismissal could be counted as a favorable outcome for Moghaddam. However, Moghaddam failed to provide any factual support of settlement other than his declaration. As noted above, the court could reasonably discount Moghaddam's self-serving statements.

The second lawsuit against Seyrafi (OCSC No. 99FL003578) was for civil harassment, seeking a TRO. In February 2001, the Orange County Superior Court judge dismissed the matter when Moghaddam failed to appear for a scheduled order to show cause (OSC) hearing. Moghaddam asserts he had a good excuse and, therefore, the dismissal should not count as a strike against him. Specifically, he failed to appear because he was in pretrial detention in a criminal case. We agree with the Bones' argument the excuse is irrelevant. It does not change the fact termination was not favorable to Moghaddam. (See *Tokerud, supra*, 38 Cal.App.4th at p. 779 [presumption voluntary dismissals are in favor of defendant unless rebutted by plaintiff with contrary proof].) Section 391 permits the court to consider any five actions "maintained in propria persona . . . that have been . . . finally determined adversely to the person." Here, the dismissed action was "nevertheless a burden on the target of the litigation and the judicial system, albeit less of a burden than if the matter had proceeded to trial." (*Tokerud, supra,* 38 Cal.App.4th at p. 779.) It was not an abuse of discretion for the court to take it into consideration.

The cases cited by Moghaddam, *Dees v. Billy* (9th Cir. 2005) 394 F.3d 1290 (*Dees*) and *Bittaker, supra,* 55 Cal.App.4th 1004, are inapt. Neither case addresses the issue of whether the dismissal of a civil harassment action for failure to appear is an adverse determination within the meaning of section 391. The court in *Dees, supra,* 394 F.3d at page 1294, held "a district court order staying judicial proceedings and compelling arbitration is not appealable even if accompanied by an administrative closing. An order administratively closing a case is a docket management tool that has no jurisdictional effect." In *Bittaker, supra,* 55 Cal.App.4th 1004, the court held a petition for habeas corpus is not a civil action/proceeding within the meaning of the vexatious litigant statute and consequently an inmate who had been declared a vexatious litigant could file a petition for a writ of habeas corpus unencumbered by vexatious litigant procedures. Without providing much reasoned legal analysis, Moghaddam asserts a civil harassment action is comparable to either an administrative hearing or a habeas corpus hearing and "does not fall within the ambit of the vexatious litigant statute." We disagree.

The purpose of the vexatious litigant statutory scheme is to deal with the costs and problems created by the unrelenting litigant who constantly has a number of groundless actions pending. If safeguards are not kept in place with respect to civil harassment restraining orders, the unfortunate defendant who has become the "target of one of these obsessive and persistent litigants" may suffer serious financial consequences in defending themselves, or worse, find themselves unreasonably subjected to restraining orders backed by the threat of criminal penalties. (See *First Western Development Corp. v. Superior Court* (1989) 212 Cal.App.3d 860, 867-868.) The vexatious litigant prefiling requirement is akin to a licensing or permit system, which constitutes a "'practical means of managing competing uses of public facilities[.]'" (*Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 60.) A vexatious litigant who is truly the victim of harassment shall have his day in court after satisfying the judge that "it appears that the litigation has

merit and has not been filed for the purposes of harassment or delay." (§ 391.7, subd. (b).) Seyrafi was twice the target of Moghaddam's lawsuits. Judge Watson acted well within his discretion to count both the actions as one strike against Moghaddam. We find the actions could have been treated as two separate strikes.

(4) Moda v. Sepetjian (Case No. SC079629)—Adverse Judgment Against Moghaddam

This case involves another Mercedes vehicle Moghaddam purchased in 1999 and then sued the seller for repossessing after he failed to make payments while he was incarcerated. Moghaddam, in propria persona, sued the seller in 2004, the case was arbitrated, and a judgment in favor of the seller was confirmed by the court in 2005. On appeal, Moghaddam does not dispute this was a proper case for the trial court to consider in determining whether he is a vexatious litigant.

(5 & 6) Moghaddam v. Bureau of Prisons (Seifert) (Case No. CV02-1215 CJC (FMO)) and the Appeal

Moghaddam commenced a civil rights violations lawsuit against the United States Bureau of Prisons and Wayne Seifert (in his official capacity as warden), in a U.S. District Court. In 2004, the court dismissed his action with prejudice. Moghaddam appealed the order to the Ninth Circuit Court of Appeals. Moghaddam argued the case and the appeal should not have been counted as a strike, and certainly not two separate strikes against him. He complained the appeal was still pending and not final when the trial court counted it as a strike. Moghaddam also asserted he was represented by counsel midway through the district court process and, therefore, these cases were not maintained by himself acting in propria persona.

As explained above, the fact Moghaddam was represented by counsel midway through the proceedings is irrelevant. (§ 391, subd. (b)(1); see *Stolz*, *supra*, 15 Cal.App.4th at p. 225.) Second, Moghaddam is wrong to claim the federal judgment was not final. It is deemed final unless and until it is reversed on appeal. (*Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881, 887 ["A federal judgment is as final in

California courts as it would be in federal courts . . . . We need not now decide questions that may arise if plaintiffs are successful in their Ninth Circuit appeal[]"].) The court did not abuse its discretion in considering the federal district court's adverse judgment of dismissal. Whether the appeal should count as a second strike is an interesting question we need not decide because the court listed more than five other qualifying in propria persona lawsuits.

(7) Moda v. Showcase Property Management Services (Case No. 00CC10052)—Case Dismissed

In August 2000, Moghaddam (aka: Kevin Moda) filed this lawsuit, and in 2001 it was dismissed. In Moghaddam's opposition to the vexatious litigant motion, he declared this was "tentatively settled . . . but more importantly, the reason why the case was not dismissed versus ordered dismissed was that I was in pre-trial detention . . . at the time of the OSC re[garding]: dismissal." Again, Moghaddam presented no direct evidence to support his claim other than his self serving declaration. On appeal, Moghaddam asserted the case was settled and "administratively dismissed" while he was in custody. There is absolutely no evidence in the record to support this new claim. The Bones submitted the trial court docket from this case which shows the superior court scheduled an OSC regarding dismissal and then entered a minute order simply indicating "case dismissed."

(8) Moghaddam v. Bone—as to Dismissal of World Omin Vt. Inc. and Experian

Finally, the court considered Moghaddam's dismissal of the Bones' codefendants, the leasing agency and the credit agency, in 1999 as a strike against Moghaddam. In his declaration, Moghaddam stated they were dismissed after a negotiated settlement. The Bones submitted copies of the requests for dismissals, filed two months after the action was filed. Again, Moghaddam had the burden of proving the voluntary dismissal was a favorable termination. The court could discount his declaration as lacking credibility.

VII. Jurisdiction to Order $30,000 Undertaking

Moghaddam claims the court lacked jurisdiction to order a $30,000 undertaking because the Bones failed to follow the requirement of specifying "in the first paragraph" of their motion "what relief is sought and why (what grounds and how much)." We conclude the applicable statute and rules were followed.

We begin with section 391.1, which provides, "In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant." There is no express requirement that an amount for the security be specified in the first paragraph of the motion.

Section 1010 provides, in relevant part, notice of a motion "must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based. . . ." Similarly, California Rules of Court, rule 3.1110(a), provides "A notice of motion must state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order." These provisions simply require a notice of motion state *the grounds* for the motion. These rules were obeyed.

We note, none of the cases cited by Moghaddam hold a party is required to specify an exact dollar amount when seeking a court ordered security bond. (E.g., *People v. American Surety Ins. Co.* (1999) 75 Cal.App.4th 719 [in a bail forfeiture proceeding, trial court properly determined it lacked jurisdiction to grant surety's motion to extend the 180-day period to vacate the forfeiture of the bond]; *Gonzales v. Superior Court* (1987) 189 Cal.App.3d 1542 [held a court may not grant summary adjudication of issues where the notice of motion was only for summary judgment].) Rather, the cases discussing what must be contained in the moving papers uniformly hold the moving party is limited to the stated grounds upon which the party seeks relief. The Bones got no more

than what they asked for, i.e., an order requiring Moghaddam to furnish security based on the showing he is a vexatious litigant and there is not a reasonable probability he will prevail in the litigation against the moving defendants. (§ 391.1.)

VIII. Rulings on Moghaddam's Evidentiary Objections

Moghaddam asserts the court erred in overruling all of his objections to the declaration of M. Candice Bryner (Bones' counsel) and for failing to state reasons for its ruling. His primary objection to the evidence is the Bones failed to lay a proper foundation for the introduction of all the exhibits attached to their counsel's declaration. However, he fails to appreciate Bryner's declaration requested the court take judicial notice of the attached records, all of which were court records. (Evid. Code, § 452.) We conclude the court had authority to take judicial notice of the court records, including the orders and judgments relating to Moghaddam's prior in propria persona litigation endeavors. Moghaddam has not provided any legal authority holding the court was required to state reasons for granting the judicial notice request. There is no such rule. The court did not abuse its discretion in overruling the objections, and taking judicial notice of the relevant and probative evidence.

IX. Issue Concerning Our Prior Opinion

Moghaddam argues our prior opinion reversing the order setting aside the default and remanding the case serves to nullify all orders issued while the appeal was pending, including the vexatious litigant finding and order for a $30,000 security. Nonsense. As aptly noted by the Bones, section 916, subdivision (a), provides, "Except as provided in sections 917.1 to 917.9, inclusive, and in section 116.810, the perfecting of an appeal *stays proceedings* in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, *but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.*" (Italics added.) Moghaddam failed to address, much less acknowledge, the court's authority under section 916.

Moghaddam's status as a vexatious litigant was not an issue that would have any impact on the effectiveness of the appeal. The court had authority to consider the motion.

Moghaddam argues our prior opinion held the prior order setting aside the default was void, leaving the Bones back in default and without standing to file any motions. He is wrong. When the Bones made the vexatious litigant motion, the appeal was still pending, causing all orders relating to the default to be stayed. (§ 916.) Accordingly, the Bones had standing in the active case to conduct discovery (which they did) and litigate collateral matters, which did not affect the orders being appealed.

X. Denial of the Motion to Reconsider the Vexatious Litigant Finding and the Discovery Sanction Order (Deeming Admitted the Requests for Admissions)

Moghaddam complains the court failed to reconsider the vexatious litigant finding and the discovery sanction. He argues the reconsideration motion was made based on the new fact our court's reversal placed the Bones in default. He points out the motion was heard in November 2006, before the court again vacated the default in December 2006. This argument is based on the same faulty premise as the prior argument. The answer is the same: The Bones had standing to make motions while the appeal was pending. Our opinion reversing and remanding the matter is not a "new fact" that changes Moghaddam's status as a vexatious litigant. Nor does it change the fact he failed to respond to discovery requests. And, as the trial court correctly pointed out, in denying the motion, it was questionable if Moghaddam had standing to bring the motion for reconsideration because he had not yet posted the court-ordered $30,000 bond (order dated June 14, 2005).

Moghaddam boldly asserts the court clearly misunderstood the law and procedures, as evidenced by the fact it stated on the record the motion for reconsideration was denied, but in the corresponding minute order it stated the motion was continued. No such conclusion can be drawn from what is likely a clerk's error. As stated above, we conclude the court correctly applied the law. At the next hearing, a different trial judge

noted Judge Watson had denied the motion for reconsideration and "[t]his court would likewise deny this motion: DENY RECONSIDERATION." There is no question the trial judges knew the status of the case and the applicable law.

XI. No Abuse of Discretion in Ruling Moghaddam Did Not Have a Reasonable Probability of Prevailing, Justifying the Order He Post a Security Bond

We begin our analysis on this issue by discussing the standard the court was required to apply. A motion for an order requiring a vexatious litigant to furnish security must be based on a showing that "there is not a reasonable probability that [a plaintiff determined to be a vexatious litigant] will prevail in the litigation against the moving defendant." (§ 391.1.) The Court of Appeal in *Devereaux v. Latham & Watkins* (1995) 32 Cal.App.4th 1571, 1582-1583 (*Devereaux*), held that to make this showing, a moving defendant must demonstrate "the plaintiff's recovery is foreclosed as a matter of law or that there are insufficient facts to support recovery by the plaintiff on its legal theories, even if all the plaintiff's facts are credited." However, in *Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780 (*Moran*), the Supreme Court disapproved *Devereaux* on this point, holding that under section 391.1 the trial court was not required to assume the truth of a vexatious litigant's factual allegations, but was authorized to hold an evidentiary hearing to receive and weigh evidence before deciding whether that litigant had a "reasonable probability of prevailing." (*Moran, supra,* 40 Cal.4th at pp. 782, 785, fn. 7.)

Thus, our review of the trial court's ruling is very limited. A trial court's conclusion a vexatious litigant must post security does not, as with a demurrer, terminate the action or preclude a trial on the merits. Rather, it merely requires the party to post security. Accordingly, if there is any substantial evidence to support a trial court's conclusion that a vexatious litigant has no reasonable probability of prevailing in the action, it will be upheld. (See *Moran, supra*, 40 Cal.4th at pp. 784-786.) Moghaddam presents evidence favorable to his position, ignoring the contrary evidence, and he asks

us to apply the higher burden of proof standard articulated in the *Devereaux* case. However, we are bound by the Supreme Court's analysis, and we will not reweigh the evidence. The Bones presented evidence Moghaddam took possession of the vehicle in January 1999 and failed to meet the next three lease payments. This evidence supports the court's conclusion Moghaddam did not have a reasonable probability of prevailing in his breach of contract action against the Bones.

XII. The Requests for Admissions

Moghaddam maintains the motion to deem the first set of requests for admissions admitted was not on calendar, but the court made its ruling based on the Bones' oral motion. He states the requests were served on the wrong address. He argues the court could not rule on the motion without a properly noticed motion and a hearing on the motion. He has misrepresented the record. Contained in the Bones' respondents' appendix is a copy of their February 22, 2005, motion to deem the first set of requests for admissions admitted and request for sanctions. The hearing was scheduled for March 22. It was mailed to Moghaddam's counsel at the time, Payman Taheri.

The court continued the hearing to April 12, to be heard concurrently with Moghaddam's motion seeking section 473 relief from the court's order setting aside the judgment. In early March, the parties filed a stipulation agreeing to trail the discovery motions and Moghaddam's section 473 motion to May 4, 2005. Moghaddam failed to file an opposition to the discovery motion seeking to deem the admissions admitted. It cannot be said the court abused its discretion in granting the motion.

XIII. Moghaddam's Request for Attorney Fees Incurred on Appeal

The court denied Moghaddam's attorney fee request, stating (1) Moghaddam had failed to comply with the vexatious litigant requirements, and (2) attorney fees were not authorized by the contract. As to the first reason stated, Moghaddam claimed the vexatious litigant orders "are void and dead on arrival" and the court did not understand he was seeking fees for the appeal, not for prevailing on an issue

in the superior court. Not surprisingly, Moghaddam does not provide any legal authority to support this claim. His theory runs contrary to the intent and purpose behind the vexatious litigant statutory scheme. The fact a vexatious litigant is meritorious on one issue is not a reason to ignore the court's vexatious litigant finding which relates to all future matters. It does not mean the vexatious litigant has changed his ways. (*Luckett v. Panos* (2008) 161 Cal.App.4th 77, 86 ["to throw a couple metaphors into a blender here, just because a vexatious litigant *can* change his spots does not mean he or she has turned a new leaf"].) Moghaddam's failure to comply with the court order he furnish security was a proper reason to deny him further access in the courts, and deny his motion for attorney fees.

XIV. The Motions Filed While This Appeal was Pending

As noted in the first section of this opinion, the parties filed numerous motions while the case was being briefed and awaiting oral argument. We will not repeat the motions and requests that have already been ruled on. The motions left to be decided in conjunction with the appeal are as follows:

A. On April 18, 2008, the Bones field a request for judicial notice regarding new evidence Moghaddam's criminal history included a forgery conviction. Moghaddam filed an opposition. The Bones filed an objection and a motion to strike the opposition. This request for judicial notice and the motion to strike are denied. Although judicial notice generally may be taken of federal and state court records (Evid. Code, § 452, subd. (d)), it is inappropriate in this case because the forgery conviction is new evidence that was not considered by the trial court in making its ruling. Because we review for abuse of discretion, it is not proper to consider new evidence. The motion to strike the opposition is denied as moot;

B. On June 19, the Bones filed a motion for sanctions ($24,000) and a motion for judicial notice of records from this court and other courts purportedly supporting sanctions. The motion is based on the assertion the appeal is frivolous,

Moghaddam and his counsel have a history of "flagrant and repeated" violations of the court's rules, and "this court should take all measures necessary to protect the Bones," the public, and the integrity of the judicial system from his harassing vexatious litigation conduct. We grant the motion for judicial notice of the court records (Evid. Code, § 452, subd. (e)), and we have considered them. However, we deny the motion for sanctions. We do not deem this case an appropriate one for the imposition of sanctions under the standards of *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648-651. As for the Bones' concerns for themselves, the public, and the judicial system in the future, we have faith the vexatious litigant statutes will provide the required protection and deterrence;

C. Based on our ruling above, we deny Moghaddam's June 26, 2008, motion to strike the appendix and addendum of court records submitted by the Bones with their June 19, 2008, request for judicial notice;

D. On June 26, 2008, Moghaddam moved for sanctions ($7,875) against the Bones and their attorney, Candice Bryner, for filing a frivolous motion for sanctions and an improper appendix. The motion is denied because although we denied the Bones' motion for sanctions, it was a close call, and by no means frivolous;

E. On June 26, 2008, the Bones filed a motion requesting this court issue a prefiling order to preclude Moghaddam from filing litigation *in the future*. (§ 391.7.) At the time, Moghaddam was attempting to secure a written final judgment in the trial court and the Bones were concerned he would try to appeal all the same orders *again* in the event he was unsuccessful in the present appeal. They failed to appreciate the orders were nonappealable and Moghaddam was simply attempting to secure the judgment before asking this court to exercise its discretionary power to treat his appeal as being from the final written judgment. As explained in the first section of this opinion, this is exactly what occurred. There is no danger of a second appeal from the same orders.

In any event, this court has authority to enter a prefiling order under section 391.7. (*In re Luckett* (1991) 232 Cal.App.3d 107, 109-110.) As described above, there was ample evidence in the record to support the trial court's determination Moghaddam should be deemed a vexatious litigant. "Where a plaintiff has already been declared vexatious and previously received the benefit of a noticed motion and oral hearing, a defendant moving under section 391.7 need not again establish the plaintiff's status." (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 225.)

Indeed, the remedy under section 391.7, subdivision (a), simply provides "In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed." Because the trial court has already declared Moghaddam vexatious, neither the trial court nor this court is required to provide Moghaddam with another noticed motion or hearing before making an order requiring he comply with section 391.7 (prefiling orders).

We have carefully reviewed the record in this particular case, as well as the evidence presented below of other litigation determined adversely to Moghaddam. We have affirmed the trial court's order declaring Moghaddam vexatious due to his history of misusing the courts of this state, and wasting precious time and resources of the opposing parties and the judicial system. (§ 391, subd. (b)(3).) The primary goals of the vexatious litigant statutory scheme would be served by subjecting Moghaddam to a prefiling order henceforth.

Accordingly, we have prepared an order to be filed the same day as this opinion, providing that pursuant to section 391.7, subdivision (a), Moghaddam may not file "any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be

filed." Disobedience of this order may be punished as a contempt of court. (*Ibid*.) "The presiding judge shall permit the filing of such litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in section 391.3." (§ 391.7, subd. (b).)

The clerk of this court is directed to provide a copy of this opinion and order to the Judicial Council. (§ 391.7, subd. (e).) Copies shall also be mailed to the presiding judge and clerk of the Orange County Superior Court; and

F. On June 26, 2008, the Bones filed a motion for judicial notice in support of the motion for a vexatious litigant prefiling order, accompanied by two volumes of documents titled "appendix of exhibits in support of [Bones'] motion for a vexatious litigant pre-filing order." Because the trial court has already held a hearing and determined Moghaddam is a vexatious litigant, we need not consider this new evidence. Accordingly, the motion for judicial notice is denied as moot.

DISPOSITION

The orders and judgment are affirmed. The Respondents shall recover their costs on appeal.

All motions that were to be decided in conjunction with the appeal are denied (for reasons stated in the opinion above) with the exception of: (1) the Bones' June 19, 2008, request for judicial notice, which is granted; and (2) the Bones' motion for an order subjecting Moghaddam to a prefiling order for future litigation, which is also granted. Henceforth, we order pursuant to section 391.7, subdivision (a), Moghaddam may not file "any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed." The clerk of this court is directed to provide a copy of this opinion and order to

the Judicial Council. (§ 391.7, subd. (e).) Copies shall also be mailed to the presiding judge and clerks of the Orange County Superior Court.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.